

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Public Inquiry on Regulations
Pertaining to 39 U.S.C. § 601

Docket No. PI2021-2

PUBLIC REPRESENTATIVE COMMENTS

(August 26, 2021)

I. INTRODUCTION

On July 2, 2021, the Commission issued an order commencing this public inquiry concerning regulations pertaining to 39 U.S.C. § 601 and providing an opportunity for public comment thereon.¹ Section 601 prescribes when letters may be carried out of the mail, or when the letter monopoly is not applied to a mailpiece. In 2006, the PAEA² prescribed new price and weight limits to the letter monopoly, repealed the Postal Service's authority to administratively suspend the operation of the postal monopoly, and repealed the Postal Service's authority to implement provisions of the criminal code defining the scope of the monopoly. The PAEA also grandfathered the continuation of private activities permitted by Postal Service regulations for the carriage of mailpieces out of the mail. 39 U.S.C. § 601(b)(3). Most relevant here, the PAEA repealed the Postal Service's authority to adopt any regulations creating exceptions to, or defining the scope of, the postal monopoly. See 39 U.S.C. §§ 401(2), 404(a)(1), and 601. Rather, Section 601(c) of the PAEA authorized the Commission to issue "[a]ny regulations necessary to carry out this section [601]." Order No. 5930 at 4.

Before initiating this inquiry, the Commission had issued an advance notice of proposed rulemaking on February 7, 2020, seeking public comment about potential

¹¹ Notice and Order Providing an Opportunity to Comments on Regulations Pertaining to 39 U.S.C. § 601, July 2, 2021 (Order No. 5930).

² Postal Accountability and Enhancement Act, Pub. L. 109-435, 120 Stat. 3198 (2006).

legislation and regulations the Commission might propose or implement to carry out the requirements of PAEA Section 601.³ On April 7, 2020, several comments were filed by the Public Representative and others responsive to several questions in the ANOPR. See Order No. 5930 at 5. On July 2, 2021, concurrently with the issuance of Order No. 5930 initiating this inquiry, the Commission ordered Docket No. RM2020-4 to be held in abeyance “until after the public inquiry proceeding is completed.”⁴

In Order No. 5930, the Commission stated that because of the length of time since the comments were received in Docket No. RM2020-4 and the breadth of topics covered in the previous comments, the Commission has requested updated comments. The comments are to focus the Commission’s “inquiry on the statutory exemptions in Sections 601(a) and (b), and what regulations under Section 601(c), if any, are needed to carry out those exemptions.” Order No. 5930 at 6. This inquiry is limited “to two issues: (1) whether Postal Service regulations administering current Sections 601(a), 601(b)(1), and 601(b)(2) should be adopted by the Commission; and (2) what private carrier services are within the scope of Section 601(b)(3).” *Id.* at 6.

Section 601(a) lists specific requirements to be met before letters may be carried out of the mail as an exception to the letter monopoly. Section 601(a) sets forth six conditions under which a letter may be carried out of the mail: the letter must be enclosed in an envelope, Section 601(a)(1), and the amount of postage which would have been charged, if mailed, is attached to the envelope, paid by stamps or postage meter stamps, Section 601(a)(2). It further provides that the envelope be properly addressed, Section 601(a)(3), and sealed so the letter may not be removed without defacing the envelope, Section 601(a)(4). Finally, any stamps on the envelope must be canceled in ink by the sender, Section 601(a)(5), and the date of the transmission or receipt by the carrier is endorsed in ink on the letter, Section 601(a)(6).

Prior to the PAEA, Section 601(b) appeared to provide the Postal Service broad authority to suspend the operation of any of the required conditions in Section 601(a) to

³ Docket No. RM2020-4, Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601, Order No. 5422, February 7, 2020 (ANOPR).

⁴ Docket No. RM2020-4, Order Holding Rulemaking in Abeyance, July 2, 2021 (Order No. 5929) at 2.

permit the carriage of a letter out of the mails. At the time, Section 601(b) provided that the Postal Service could issue regulations permitting exceptions to the letter monopoly if necessary to suspend the operation of the letter monopoly because “the public interest requires the suspension.” See repealed Section 601(b). Consequently, the Postal Service issued several regulations allowing for such carriage, particularly regulations at 39 CFR Parts 310 and 320. However, Section 601(b) was removed by the PAEA, therefore eliminating the Postal Service’s authority to alter any of the conditions set forth in Section 601(a) for carrying a letter out of the mails. The PAEA deleted the old Section 601(b) and replaced that authority with a new Section 601(b).

Revised Section 601(b) provides two additional conditions to circumvent the letter monopoly that were not listed in Section 601(a): if the amount paid for the private carriage of the letter is “at least equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter, Section 601(b)(1), or if the letter weighs “at least 12.5 ounces.” Section 601(b)(2).⁵ The latter language effectively negated the Postal Service regulation at section 320.6(c) where a letter is conclusively presumed to be urgent and covered by the suspension of the letter monopoly *if* the letter is at least “three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater.”

The PAEA also added a “grandfather clause” in Section 601(b)(3), specifically authorizing the carriage of letters outside the mails if “such carriage is within the scope of services described by [Postal Service regulations] (including in particular, sections 310.1 and 320.2-320.8 [of CFR title 39] as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section [601] (as then in effect).” See 39 CFR 310.1 and 39 CFR 320.2-320.8 (2005).

Generally, the Postal Service regulations at 39 CFR 310 provide detailed rules to permit a carrier to qualify for an exception to the six requirements for carrying letters out of the mail in section 310.2 as well as providing for five other exceptions to the letter

⁵ Part of the Postal Service’s regulations at section 320.6(c) regarding extremely urgent letters have been rendered obsolete and inoperative, but they remain in the CFR. Section 320.6(c) currently states, in part: “It will be conclusively presumed that a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is a least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater.”

monopoly in section 310.3(a)-(e).⁶ Sections 320.2 through 320.8 of the regulations also provide for exceptions to the letter monopoly.⁷ New Section 601(b)(3) specifically grandfathers the Postal Service's regulations permitting the carriage of letters out of the mail but deleted the previous Postal Service authority to suspend the operations of the letter monopoly if "the public interest requires the suspension." However, it is noteworthy that Section 601(b)(3) does not grandfather the Postal Service's regulations providing for Postal Service procedures to change those regulations, nor does it affirmatively provide the Commission with authority to change or modify the suspensions and exceptions. The Commission is now charged only with issuing regulations related to the carriage of letters out of the mails pursuant to Section 601. 39 U.S.C. 601(c).

II. WHETHER POSTAL SERVICE REGULATIONS ADMINISTERING SECTIONS 601(a), 601(b)(1) AND 601(b)(2) OF TITLE 39 SHOULD BE ADOPTED BY THE COMMISSION

In general, pursuant to the mandate of Section 601(c), for the convenience of the interested public and to clarify outdated relevant Postal Service regulations, the Commission should adopt appropriate Postal Service's regulations administering sections 601(a), 601(b)(1), and 601(b)(2) currently set forth in 39 CFR 310.1-310.7 and 320.1-320.9. Given the several exceptions to and suspensions of the postal monopoly permitted by statute and the presently published Postal Service regulations, consolidation of those, where feasible, is most desirable for the convenience of practitioners and the public generally.

To determine which of the Postal Service regulations should be adopted by the Commission, several principles should be applied. First, the new Commission rules for Section 601 over which the Commission has authority should be comprehensive and located in one location within the Commission's rules. Other rules applicable to the

⁶ Section 310.3(a)-(e) exceptions are: letters accompanying and relating to cargo of the carrier, letters carried by private hands without compensation, special messengers for particular occasions for a limited number of letters, and carriage prior to or subsequent to mailing.

⁷ Section 320.2 through 320.8 suspensions are for: certain data processing materials, certain letters of college and university organizations, certain inter-national-ocean carrier-related documents, extremely urgent letters, advertisements with parcels or periodicals, and international remailings.

letter monopoly and the carriage of letters also apply, but they apply pursuant to statutory sections other than Section 601, and fall within the province of the Postal Service and cannot be modified by the Commission.⁸ Second, the Commission's rules should be clear.

Third, those parts of the current Postal Service rules, sections 310.1 and 320-2-320-9 of title 39 and any other pertinent rules, that are no longer supported by statutory authority should be omitted from the Commission's Section 601 rules. To the extent the Postal Service rules conflict with the Commission's authority, the Commission may direct the Postal Service to modify its regulations.

Fourth, the procedure for obtaining advisory opinions or other relief from the substance of the rules within the Commission's authority should be included within the Commission's Section 601 rules. It will remain for the Postal Service thereafter to clarify or adjust and modify its own rules, regulations and manuals to be consistent with the Commission's Section 601 rules. The Commission must leave to the Postal Service the primary tasks of interpretation without alteration, oversight and enforcement of the letter monopoly including exceptions and suspensions currently permitted by law. This is not unlike the Commission's rules set out in the MCS where oversight, compliance, and enforcement of the mail classification rules reside largely, in the first instance, with the Postal Service.

- A. The Commission should adopt the Postal Service's regulations in 39 CFR 310.1-310.7 that reflect current statutory exemptions in section 601.

The Postal Service's regulations permitting letters to be carried out of the mails, when such carriage is within the scope of services described by regulations in effect on July 1, 2005, were grandfathered by Section 601(b)(3). However, to the extent those regulations provided for any future adjustments to the letter monopoly, the authority was moved from the Postal Service to this Commission by Section 601(c). Thus, any provisions in the Postal Service regulations providing for Postal Service adjustment to

⁸ It may be more desirable to place all of the relevant regulations within a single location within the CFR, but neither the Commission nor the Postal Service has jurisdiction over the entire subject matter.

those regulations without Commission approval are contrary to Section 601(c) and must be omitted from regulations adopted by the Commission.⁹

The Public Representative offers the following modifications of the current Postal Service regulations prior to their adoption and placement into the Commission's own regulations.

1. Part 310, Section 310.1. No language in Section 310.1 is made obsolete by the revisions in Section 601. Therefore, the Commission should adopt and include at an appropriate location in its own regulations section 310.1 in its entirety. The current Postal Service regulations at Section 310.1(a)(7) include note 1 referencing the Postal Service. That note may remain in its entirety including the reference to the Postal Service because the Postal Service made the determination, pursuant to the superseded section 601(b), that certain communications are not deemed letters within the meaning of the regulations.

Placement of all relevant Postal Service regulations within the Commission's own regulations ensures that any details will not be altered in the future without Commission approval, whereas merely cross-referencing to the Postal Service's current regulations without specifically including them in the Commission's regulations will not prevent their modification by the Postal Service without constant monitoring and specific Commission advance approval of changes.

2. Part 310, Sections 310.2 through 310-7. Adopt the entire sections into the Commission's rules *except for* the following revisions made necessary by section 601.

a. Section 310.2(b)(1)(ii). Insert the words "consistent with this section" to read that an activity is lawful with respect to a letter under 310.2(b) if, "The amount of postage which would have been charged on

⁹ Internal citations cross-referencing current Postal Service regulations must be conformed to the appropriate sections of the new Commission regulations in title 39.

the letter if it had been sent through the Postal Service is paid by stamps, or postage meter stamps, on the cover or by other methods consistent with this section approved by the Postal Service.” This added language is to ensure other methods beyond the scope of the existing Section 310.2 are not expanded by the Postal Service in a way that is inconsistent with the current regulation.

b. Section 310.2(b)(2)(i). If the Commission wishes to eliminate for the future the Postal Service’s practice of entering into written agreements for the payment of postage, it may consider inserting the words “in effect on July 1, 2005” after “The activity is in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service.” Although the practice of written agreements for the payment of postage does not conform to the strict language of Section 601(a) requiring a stamp on each letter, agreements for the payment of postage are not unlike metered postage agreements. The Public Representative does not believe that the purpose of the statute is compromised by such agreements when the Postal Service receives the correct postage. These regulations neither expand nor restrict the monopoly but relate to administration of the collection of postage, a matter wholly within the Postal Service’s authority. It is preferable that the Commission’s regulations should be silent on this matter. The collection of postage may be left to the Postal Service.

c. Section 310.2(c). Delete this section in its entirety that currently states, “The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.” This deletion is necessary because the revision of Section 601 eliminated the previous Section 601(b) that permitted the Postal Service to suspend the operation of any part of Section 601(a) where the public interest requires the suspension. That is, the Postal Service had been authorized by the repealed Section 601(b) to narrow the letter

monopoly. That authority was rescinded when Section 601(b) was eliminated by the PAEA.

d. Section 310.6 Advisory opinions. Revision of the first sentence of section 310.6 should be considered. It provides for obtaining an advisory opinion on any question arising under part 310 and part 320 of the chapter by writing to the General Counsel of the Postal Service at the provided address. The Postal Service no longer has authority to issue new regulations now subject to Commission authority. However, the Commission may specifically authorize the Postal Service's General Counsel to decide questions presented for an advisory opinion interpreting, without modifying, existing regulations, and require simultaneous submittal of an information copy of the question to the Commission. Alternatively, the Commission may provide for the initial submittal of any such questions to the Commission's General Counsel for consideration and appropriate response.

B. The Commission should adopt sections 320.1 through 320.5 and 320.7 through 320.9 of the Postal Service's regulations in 39 CFR 320.1-320.9 reflecting current statutory exemptions in section 601.

Suspensions of the Private Express Statutes that were granted by the Postal Service pursuant to the repealed section 601(b) were grandfathered by section 601(b)(3) of the PAEA.¹⁰

1. Sections 320.1 through 320.5 and 320.7 through 320.9

Subject to the comments below, these regulations may be adopted by the Commission in their entirety and inserted within the Commission's regulations.

2. Section 320.6.Suspension of extremely urgent letters.

Most of this section may be adopted by the Commission except for one phrase of section 320.6(c) which must be deleted and replaced. Delete the language "three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater" and replace the language with the language of Section 601(b)(3), "the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter, or the letter weighs at least 121/2 ounces."

3. Section 320.9 provides for revocation or amendment of suspensions permitted under Part 320 in accordance with the Administrative Procedure Act, citing 310.7. Any revocation or suspension pursuant to that section is limited to the level of operations antedating the date of revocation. The section does not provide the grounds for revocation, but appears to assume the revocation could be based upon a general revocation of the regulations permitting suspension or revocation of the postal monopoly applicable to all carriers; an authority that no longer resides with the Postal Service. Similarly, there is no affirmative authority for the Commission to suspend the

¹⁰ As noted in the Postal Service's regulations, some items do not self-evidently lie outside the definition of "letter," but the Postal Service specifically excluded these items by definition and suspended the restrictions of the Private Express Statutes pursuant to 601(b) prior to the PAEA. See note 1 at 39 CFR 320.1.

postal monopoly requirements or provide for exceptions to the postal monopoly. Individual violations of the rules may, however, warrant revocation of the suspension or exception for individual carriers. Therefore, section 320.9 may also be inserted into the Commission's rules.

4. Correction of cross references.

If the Commission is to adopt Part 320 of the Postal Service's regulations and insert the language into its own regulations, the Public Representative suggests that a single identical correction is necessary for several sections of the current Postal Service's regulations. The reference to section 310.2(b)(1) through (6) in several sections of Part 320 is incorrect and should be corrected in the Commission's regulations. The reference to section 310.2(b)(1) through (6) in several sections of Part 320 should be corrected to read "section 310.2(b)(1)(i) through (vi)" in sections 320.2(a), 320.4, 320.5, 320.6(a), 320.7(a) and 320.8(a).

III. WHAT PRIVATE CARRIER SERVICES ARE WITHIN THE SCOPE OF SECTION 601(B)(3)?

Section 601(b)(3) authorizes the continuation of certain private activities permitted by Postal Service regulations to be carried out of the mails. The Commission "seeks comments on what private carrier services are within the scope of Section 601(b)(3) and whether regulations are needed to clearly enumerate those services." Order No.5930 at 7. It also seeks "suggestions regarding what regulations may be needed to enumerate in clear terms all instances where private carrier services are within the scope of Section 601(b)(3)." *Id.*

- A. The Commission does not have authority pursuant to Section 601 to modify substantively the suspensions authorized by the Postal Service regulations.

An initial question is whether Congress granted the Commission authority to modify administrative suspensions of the Private Express Statutes when it specifically repealed the Postal Service's purported authority to establish administrative

suspensions. Section 601(b)(3) clearly retains the Postal Service's regulations suspending certain Private Express Statutes, but nowhere does it, or any other section of the PAEA, expressly or implicitly authorize this Commission to suspend further the postal monopoly. Section 601(c) does not do so. By that section, the Commission is only granted authority to issue regulations necessary to allow, pursuant to Section 601, certain communications to be carried out of the mails "within the scope" of the current Postal Service regulations and to issue regulations for the two new suspensions authorized by sections 601(b)(1) and 601(b)(2).¹¹ Nor is there any suggestion in Section 601 that the suspensions permitted by the Postal Service regulations will not apply to new carriers meeting the requirements for suspension in the future. The current requirements to qualify for suspension were grandfathered. If a future carrier meets those grandfathered requirements, the regulations should continue to apply. Section 601(c) does not limit the right of future carriers not currently carrying those types of letters out of the mail to commence that activity.¹²

There are several practical reasons for retaining the regulations as they currently exist without attempting by regulation to limit the suspensions to carriers who are currently carrying letters out of the mail. The primary difficulty is indicated by the question posed by the Commission in its request for comments, that is, "what private carrier services are within the scope of Section 601(b)(3)." It is clear from the list of suspensions and exceptions available that there are hundreds, if not thousands, of carriers carrying communications outside of the mails pursuant to the suspension and exception regulations. With the exception of the Notices of Intent to operate under the

¹¹ The Postal Service has reached the same conclusion: "In light of these specific expressions of intent, nothing in the PAEA or its legislative history indicates that Congress's conferral of rulemaking authority on the Commission would allow the Commission to modify, create, or abolish exceptions to the letter monopoly...while reserving to itself the question as to whether to further redefine the scope of the monopoly in the future." See Docket No. RM2020-4, Comments of the United States Postal Service in Response to Order No. 5422, April 7, 2020 (Postal Service Comments) at 5.

¹² Section 320.9 styled revocation or amendment of suspensions may not be invoked to alter the substantive provisions of the other regulations providing for suspensions but may be employed only as an enforcement mechanism for individual carrier violations of the regulations.

suspension for data processing materials,¹³ it is doubtful that the Postal Service has a list of all such carriers or that such a list is maintained on a current basis. Other than for data processing materials, the regulations do not, as far as the Public Representative is aware, require registration or application to qualify for a suspension. To date, given the absence of recent requests from the public for clarification or interpretation of the Postal Service's regulations, the suspension regulations appear to be well understood by carriers. It is reasonable that enforcement of the Private Express Statutes for any violations should continue to reside with the Postal Service. A compilation by the Commission at this time of carrier services operating pursuant to the suspension rules does not appear to be necessary.

- B. The Postal Service's regulations pursuant to Section 601 permitting suspensions of the Private Express Statutes should be available to additional carriers not currently undertaking those activities.

Although Congress suggested that the Postal Service may not have had the authority originally to grant with its regulations the suspensions of the letter monopoly, the PAEA does not expressly prohibit the extension of the suspensions to additional new carriers not already undertaking those activities. The Postal Service's regulations remain in place. Although Section 601(b)(3) singles out sections 301.1 and 320.2-320.8 "in particular," all of the related regulations were grandfathered, including sections 310.2-310.7 and 320.1 to the extent that they are otherwise consistent with Section 601. Nothing in those regulations limits the suspensions to existing carriers or carriers with current or specific Postal Service authorization.

In addition, the legislative history does not restrict the current suspensions to existing carriers who carry letters out of the mails. While the legislative history indicates the need to preserve the current regulations to avoid harming carriers already engaged in activities pursuant to the suspensions,¹⁴ the language of Section 601 makes no

¹³ Sections 320.2 and 320.3 include a form and require a filing with the Postal Service's Manager, Mailing Standards of a Notice of Intent to Establish Operations under Suspension of the Private Express Statutes exclusively for data processing materials.

¹⁴ The House Report indicated the grandfather provision would protect mailers and private carriers who had relied upon the regulations adopted as of the date of the bill." Order No. 5930 at 4.

attempt to limit their future application to current carriers, and to do so would be contrary to the plain language of section 601.

There are also other reasons for allowing new carriers to operate under the suspension regulations. In order to implement the suspensions, the Postal Service was required to find pursuant to the repealed section 601(b) that “the public interest requires the suspension.” The public interest determination certainly included the convenience of both the public and the Postal Service gained by the suspensions weighed against the potential estimated revenue loss for the Postal Service as well as the benefits to the carriers involved. That decision having been reached previously, a comparable analysis by the Commission that reaches the contrary conclusion may be necessary to reverse the suspension.

It also appears that the suspensions are working smoothly for the carriers and the Postal Service. The Postal Service has pointed out that the legacy aspects of Section 601 have been in place for decades and the substantial drop in requests for advisory opinions indicates public understanding of the regulatory provisions.¹⁵ To discontinue those suspensions for future carriers would eliminate the benefits in the public interest as determined by the Postal Service that warranted the current suspensions. Also, if the suspensions are removed, some of the information that would be carried out of the mails is, therefore, likely to be transferred to digital formatting, thus reducing the postage that might otherwise be collected. The potential volume migration would be difficult to estimate. Moreover, removing the suspensions for only future carriers may create costly enforcement and administrative problems for the Postal Service that could negate much of the benefit gained by new revenue. All of these factors must be considered before eliminating suspensions for any new carriers wishing to commence these activities in the future.

¹⁵ There were approximately 155 advisory opinions issued during the 1970s, 85 during the 1980s, 23 during the 1990s and only 1 since 2000, before the PAEA. Since the PAEA, there has been only “infrequent” informal correspondence about the letter monopoly. Docket No. RM2020-4, Postal Service Comments at 11. See *also* Docket No. RM2020-4, Response of the United States Postal Service to Chairman’s Information Request No. 1, March 11, 2020, Question 2.b-e.

If the Commission does insert its own regulations on the subject into title 39 of the CFR, it should also direct the Postal Service to conform its regulations to those of the Commission, as appropriate.

IV. CONCLUSION

The Public Representative submits the above comments for the Commission's consideration.

Respectfully submitted,

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